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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, **D.C. 20554**

In the matter of

2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF MEDIA GENERAL, INC., COSMOS BROADCASTING CORPORATION AND BLOCK COMMUNICATIONS

Media General, Inc. ("Media General"), Cosmos Broadcasting Corporation ("Cosmos"), and Block Communications, Inc. ("Block") (the "Joint Commenters") by their attorneys and in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding,[1] hereby submit these comments urging relaxation of the Commission's local television ownership rules

Each of the Joint Commenters serves primarily small and mid-sized markets and is interested in taking further advantage of the operational efficiencies and improved service to their communities created by local duopolies.[2] It is essential to the continued viability of quality over-the-air broadcasting services, including the production of local news and entertainment

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[1] 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules, *Notice of Proposed Rule Making*, FCC 02-249 (rel. September 23, 2002) ("*Ownership NPRM*").

programming, that duopolies be permitted in all markets. Both Media General and Block already operate duopolies pursuant to waivers which enabled them to rescue stations that otherwise may not have become viable.[3] Both have demonstrated that duopolies can improve service to local communities. Each of the Joint Commenters continues to explore potential duopoly opportunities but the existing rule makes impossible many combinations that would improve service to small and mid-sized markets.

In light of the benefits that duopolies have brought and can bring to all communities, the Joint Commenters urge the Commission to eliminate the current "eight-voices" test and to allow free transferability of duopolies.[4] In addition to being sound public policy, these changes are required because the current rules cannot meet the strict standard that the D.C. Circuit is required to apply to the Commission's ownership decisions under Section 202(h) of the Telecommunications Act of 1996[5] or the terms of the remand of the duopoly rule in the *Sinclair* case.[6] Because both the eight-voices test and the transferability restriction are contrary to –

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[2] *See* 47 C.F.R. § 73.3555. Each Joint Commenter has attached a corporate overview and description of its duopoly interests as Appendices **A-C.**

[3] **See** Pappas Telecasting of the Carolinas, *Memorandum Opinion and Order,* 17 FCC Rcd 842 (2002) (approving duopoly involving WASV-TV under the failing station exception); Kentuckiana Broadcasting, Inc., *Memorandum Opinion and Order,* 16 FCC Rcd 6974 (2001) (approving duopoly involving WFTE(TV) under the unbuilt station exception).

[4] The Joint Conimenters also encourage the Commission to examine the top-four rated stations test using the proper standard under Section 202(h) and to modify or repeal this rule if it cannot be justified as necessary in the public interest.

[5] Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), requires the Commission to: "review . . . all of its ownership rules biennially . . . and . . . determine whether any of such rules are necessary in the public interest as the result of competition . . ." and to " . . . repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996). See *Fox Television Stations v. FCC,* 280 F.3d 1027 (2000) *("FOX TV Stations"), rehearing granted in part,* 293 F.3d 537 *("FOX TV Stations Rehearing").*

[6] *Sinclair Broadcast Group, Inc. v. FCC,* 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

rather than necessary in – the public interest in light of competition in local media markets, the Commission must revise the duopoly rules as requested herein.

I. THE EIGHT-VOICES TEST CANNOT BE JUSTIFIED AND MUST BE ELIMINATED OR SUBSTANTIALLY EXPANDED.

In a string of decisions interpreting Section 202(h), the D.C. Circuit has made plain that the Commission is required to eliminate those rules that cannot be shown – in light of current levels of competition – to be necessary to the Commission's mandate to regulate broadcast television in the public interest.[7] The D.C. Circuit has found that Congress intended the Commission to employ a presumption that the competitive free market is the primary regulator of local media markets and to retain only those rules that are necessary to promote policy goals that market forces are insufficient to advance.[8] The D.C. Circuit also reviewed the Commission's basic duopoly rule in *Sinclair*, finding that the Commission failed to adequately justify the "eight-voices" test and ordering reconsideration.

A. Local Competition Has Eliminated the Need for a Duopoly Voices Test.

As the Commission's ownership studies show, local broadcasters are engaged in a fierce competition with multiple program delivery services for viewers' attention in every local

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[7] *See POX TV Stations*, 280 F.3d at 1035-36; *Sinclair*, 284 F.3d at 152. Moreover, in interpreting other provisions of the 1996 Act, the D.C. Circuit has held that use of the word "necessary" in the Act denotes a strict standard, more akin to indispensable than to merely "in the public interest." *See GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (interpreting "necessary in § 251(c)(6) to mean "indispensable").

[8] See *Fox TV Stations*, 280 F.3d at 1033 (". . . Congress instructed the Commission, in order to continue the process of deregulation, to review each of the Commission's ownership rules every two years . . ."), 1048 (". . . Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules.").

market."[9] A proper assessment of the current duopoly restriction requires that all media be considered, including: local television and radio stations; local cable operators and the independent cable channels they carry; DBS; local daily and weekly newspapers; the Internet; theatrical films; and home video. Considering all these sources, it is clear that the numerous media voices that exist in all local markets have eliminated the need for any voices test. This is particularly true because many of these media – DBS, cable television, and the Internet, for example – compete in every market, regardless of size. *OPP Working Paper No.* 37 shows that competition from cable alone has reduced the average audience for broadcast programming by more than one third since 1984, while cable viewership has nearly doubled, and that this trend is accelerating.[10] Another Commission study shows that viewers consider television to be a substitutable service with the daily newspapers, the Internet, and radio."[11]

Given the strength of local competition and the inherently arbitrary act ofdeciding how many local media voices are "enough," structural safeguards such as the eight-voices test cannot be justified, The only permissible course is to allow duopolies in all markets. To the extent local market concentration or competition require oversight, it is best provided by the Department of Justice, which has expertise in evaluating appropriate levels of competition and concentration. The safeguard of Department of Justice oversight renders it impossible for the Commission to show that a prophylactic rule, like the eight-voices test, is necessary in the public interest.

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[9] Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, *OPP Working Paper No. 37: Broadcasters: Survivors in a Sea of Competition*, September 2002 (describing competition from myriad sources) ("*OPP Working Paper No. 37*").

[10] *OPP Working Paper No. 37* at 20-21 and Table 9.

[11] Joel Waldfogel, *Consumer Substitution Among Media,* at 39, September 2002 (the "*Substitution Study*").

B. Local Broadcasters in Small and Mid-Sized Markets Face Competitive Handicaps that Can Be Remedied by Elimination of the Eight-Voices Test.

In the small and mid-sized markets in which the Joint Commenters operate, the current duopoly restriction hits especially hard. The competition, particularly from cable and DBS, is as strong as in larger markets, but a station's ability to absorb the accompanying revenue decreases is much less. Likewise, the cost ofconstructing DTV stations is roughly equal regardless of market size, but small and mid-market stations are less able to sustain these costs and maintain their long-term financial health. The Commission's duopoly focus on trying to find just the right number of media voices threatens to miss the forest for the trees. In small and mid-sized markets, the focus should bc on ensuring the very survival of quality over-the-air broadcasting.

In the past, the Commission has assumed that because large numbers of stations are not going dark, the broadcast industry must bc healthy. Collapse can come quickly, however, and myriad cxamples from other industries – from the collapse of passenger rail service in the 1960s to the bankruptcies faced by today's airlines – show the dangers of regulating one step behind the times. By failing to see the difficulties faced by broadcasters in small and mid-sized communities today, the Commission tomorrow could be explaining to Congress why these communities no longer have over-the-air television stations or why local television news, which is increasingly expensive to produce, has suffered or has been eliminated in those markets.

Local competition makes the eight-voices test unnecessary, and the competitive handicaps faced by local broadcasters but not shared by their competitors make the eight-voices test positively dangerous. Far from being "necessary" in the public interest, the eight-voices test is flatly contrary to the public interest.

C. Any Voices Test Must Account for All Media Voices in Local Markets.

As noted above, any determination of how many voices to require before permitting duopolies is inherently arbitrary. Nonetheless, if the Commission continues to employ a voices test, the test must be expanded to include the many diverse media in each local market. As the *Sinclair* court recognized, at minimum, all media voices counted in the radio/television cross-ownership context must be counted in the television context.” The record in this proceeding, however, already shows that list to be incomplete. To properly reflect local competition, any voices test must include local television and radio stations; local cable operators and the indepentlcnl cable channels those operators carry; DBS; local daily and weekly newspapers; the Internet; theatrical films; and home video.

There is, for example, no basis for treating independently owned or operated cable channels any differently than broadcast channels,” and the Commission must include the Internet as at least one additional voice in every community.[14] Moreover, because the Commission has before it evidence that commonly owned media outlets do not speak with a unified voice, there is no basis for requiring that each media outlet be independently owned to qualify as an additional voice.[15]

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[12] *See Sinclair*, 284 F.3d at 164-65; Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations, *Report and Order,* 14 FCC Rcd 12903, 12953 ¶ 111 (1999) (this list includes radio and TV stations, daily newspapers with circulation greater than 5% of the DMA, and cable systems) *(“Local Ownership Order”).*

[13] Although cable channels are not available free to every viewer in every market, cable penetration is sufficiently ubiquitous, and growing, to justify inclusion.

[14] The Commission now has evidence before it that consumers treat the Internet as a substitute service for news programming eliminating any possible justification for not including it in any voices test. *See Substitution Study* at 20.

[15] *See* David Pritchard, *Viewpoint Diversity in Cross-Owned Newspaper and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, at 13, September 2000.

II. THE COMMISSION SHOULD MAKE DUOPOLIES FREELY TRANSFERABLE.

The Commission also should allow unrestricted transfer of duopoly stations whether the dual ownership was created pursuant to a waiver or not. Currently, the Commission will waive the duopoly rule where an applicant shows that the second station it is seeking to acquire is failed, failing *or unbuilt*.[16] Such acquisitions are acceptable because they ensure maximum television service and because a duopolized station serves the public interest more than one that is dark or unbuilt.[17]

Under the current rule, however, a duopoly cannot he transferred to a single owner unless it conforms to the duopoly rule at the time of the sale or otherwise satisfies one of the waiver criteria.[18] This undermines the policies justifying the Commission's waiver standard by discouraging stations from investing in failed, failing, *or* unbuilt stations that they cannot later transfer lo a new owner. This restriction also is unnecessarily duplicative because the Commission's standards for initially granting waivers are sufficiently rigorous.[19]

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[16] *See Local Ownership Order*, 14 FCC Rcd at 12936-41 ¶¶ 71-87. The Commission also should consider expanding its definition of "failed" and "failing" stations. Under the current waiver standard, three years of financial turmoil is required to ensure that stations are "actually" failing. This standard makes little sense and only punishes viewers in the station's market by subjecting them to suh-par programming and service while the station struggles. In today's fast-moving marketplace, three ycars could bc the difference between a station which can be rescued and one that is beyond hope. The Commission should revisit its rules and shorten the time necessary to demonstrate that a station is failed or failing to one year or less.

[17] *See id.* at 12936 ¶ 73. *See also* Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations: Review of Policy and Rules, *Second Order on Reconsideration*, 16 FCC Rcd 1067, 1075-76 ¶ 25 (2001).

[18] *See Local Ownership Order*, 14 FCC Rcd at 12932-33 ¶ 64.

[19] The restriction also subjects duopoly owners to inconsistent obligations because they are not required to divest their duopoly interests once the station returns to profitability. *See id.* Thus, allowing free transferability would allow only for a continuation of the *status quo*.

Most importantly for the Commission's review under Section 202(h), the transfer restriction cannot be shown to be necessary in light of current levels of competition. Even in the mid-sized and smaller markets where duopoly waivers are most likely to be beneficial, rarely will diminution of a single broadcast television voice be decisive in maintaining a healthy local media market. Accordingly, contrary to congressional directives, maintaining this rule would result in more restrictive regulation than necessary to safeguard the public interest

111. CONCLUSION

The suggested changes to the duopoly rule will eliminate anti-competitive restrictions on broadcasters as they seek to compete with the many video, news, and entertainment outlets challenging them everyday in every local market. The scale and efficiencies that duopolies create will help ensure that over-the-air broadcast television remains a viable competitor in the video delivery market in small and mid-sized markets long into the future. Accordingly the Commission should restructure its duopoly rule as requested herein to eliminate its outmoded discouragement of duopoly ownership arrangements.

Respectfully Submitted,

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Appendix A

Overview of Media General, Inc.

Media General is an independent, publicly owned communications company based primarily in the southeastern United States with interests in newspapers, broadcast television stations, interactive media, and diversified information services. Media General's corporate mission is to be the leading provider of high-quality news, information, and entertainment programming by continuing to build on its position of strength in strategically located markets. Media General owns the following stations, primarily in mid-sized and small markets in the Southeast:

Station	DMA Rank
WFLA-TV, Tampa, FL	14
WNEG-TV, Toccoa,GA	35
WSPA-TV, Spartanburg, SC	35
WASV-TV (LMA), Asheville, NC	35
WIAT(TV), Birmingham, AL	39
WJWB(TV) Jacksonville, FL	53
WKRG-TV, Mobile, AL	62
KBSD-TV, Ensign, KS	65
KBSH-TV, Hays, KS	65
KWCH-TV, Hutchinson, KS	65
KBSL-TV, Goodland, KS	65
Station	DMA Rank
WTVQ-TV, Lexington, KY	66
WSLS-TV, Roanoke, VA	68

WDEF-TV, Chattanooga, TN	86
WJTV(TV), Jackson, MS	88
WJHL-TV, Johnson City, TN	93
WSAV-TV, Savannah, GA	100
WCBD-TV, Charleston, SC	103
WNCT-TV, Greenville, NC	106
WJBF(TV), Augusta, GA	113
WBTW(TV), Florence, SC	114
WRBL(TV), Columbus, GA	128
KIMT(TV), Mason City, IA	153
WMBB(TV), Panama City, FL	158
WHLT(TV), Hattiesburg, MS	167
KALB-TV, Alexandria, LA	178

In addition, Media General has been granted Commission approval to operate a duopoly in the Greenville-Spartanburg-Asheville DMA through its ownership of WSPA-TV and WASV-TV, pursuant to the Commission's "Tailing station" waiver policy.[1]

[1] ***See*** Pappas Telecasting of the Carolinas, *Memorandum Opinion and Order*, 17 FCC Rcd 842 *(2002)*.

Appendix B

Overview of Cosmos Broadcasting Corporation

Cosmos Broadcasting Corporation ("Cosmos") is the broadcast television subsidiary of The Liberty Corporation. Cosmos operates fifteen network-affiliated stations principally located in smaller and mid-sized markets in the Southeast and Midwest, and licensed to its subsidiaries CivCo., Inc. and LibCo., Inc., including:

Station	DMA Rank
WAVE(TV), Louisville, KY	48
WTOL-TV, Toledo, OH	67
WIS-TV, Columbia, SC	85
WLBT(TV), Jackson, MS	88
WFIE-TV, Evansville, IN	97
KGBT(TV), Harlingen, TX	102
KLTV-TV, Tyler, TX	108
KTRE-TV, Lufkin, TX	108
WSFA-TV, Montgomery, AL	116
KCBD-TV, Lubbock, TX	147
WWAY-TV, Wilmington, NC	148
WALB-TV, Albany, GA	150
WLOX-TV, Biloxi, MS	157
KPLC-TV, Lake Charles, LA	173
KAIT-TV, Jonesboro, AR	180

Appendix C

Overview of Block Communications, Inc.

Block Communications, Inc. ("Block") is a diversified communications company with local broadcast, newspaper and cable system holdings. Block owns or has an attributable interest in five television stations, located a mid-sized and small communities across the country. These stations include:

	DMA Rank
WDRE-TV, Louisville, KY	48
WFTE(TV), Salem, IN	48
WAND-TV, Decatur, IL	83
KTRV(TV), Nampa, ID	123
WLIO(TV), Lima, OH	201

In addition, Block opcrnte a duopoly in the Louisville DMA through its ownership of WDRB-TV and WFTE-TV. The Commission granted Block authority to operate this duopoly in 2001, pursuant to its "unbuilt station" waiver policies.[1]

[1] Kentuckiana Broadcasting, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 6974 (2001).